THE GREATEST LAND CASE IN BRITISH HISTORY

The Struggle for Native Rights in Rhodesia before The Judicial Committee of His Majesty's Privy Council

By
JOHN H. HARRIS

"By the disinterested liberality of persons in this country their Lordships had the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconcious of possessing, any case at all. Undoubtedly this enquiry has thereby been rendered more complete."

Extract from the Report of the Lords of the Judicial Committee of the Privy Council (July 29, 1918).

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When the Attorney-General, Sir F. E. Smith, opened the case for the British Crown, he prefaced his speech by emphasizing that the issues raised in this case were of the "gravest conceivable importance" to the British Empire.

Early in the year 1914, the Committee of the Anti-Slavery and Aborigines Protection Society were warned that the issues arising out of the Rhodesian Reference included a threat to native races in the British Commonwealth more grave than anything within living memory. The responsibility and the difficulties attendant upon taking up a Privy Council case on behalf of the natives were carefully weighed by the Committee, not the least of these difficulties being the fact that no matter how great the task of preparation, nothing could be disclosed to members of the Society and their supporters until the public hearing.

The Committee, after taking legal advice, came to the unanimous conclusion that the Society had no alternative; the case for the natives, no matter at what cost, must be taken up by the Society.

The Issues—73,000,000 Acres of Land.

The Chartered Company, or, to give it its full title, the British South Africa Company, claimed that the entire lands of Southern Rhodesia not leased or sold to white men were the property of its shareholders. This claim meant that not a single native throughout the territory owned a foot of the land of his ancestors, and that by some means yet to be laid before the Judicial Committee of the Privy Council the 750,000 natives had forfeited all ownership rights to their lands. The British Crown and the white settlers were affected from the constitutional standpoint, whilst the native

inhabitants of Rhodesia and other races within the British Commonwealth were most vitally concerned in two other respects :

1. If the Chartered Company succeeded, the natives of Southern Rhodesia would be so completely divested of ownership that they could only remain in their country as mere occupants upon the lands of alien landlords.

2. The confirmation by the Judicial Committee of the Company's claim would thus involve the setting aside of that pillar of the British Constitution which provides for the recognition of native customary law, particularly with reference to property rights.

The Parties.

This claim by the Chartered Company was of such an extraordinary nature that the Crown decided to oppose it. The white settlers of Rhodesia also entered a plea against a claim which threatened the future Government of Rhodesia, whilst it was arranged that Mr. Leslie Scott should appear for permission to be heard on behalf of the natives. The preliminary hearing of the Reference took place on August 4, 1914, before the Lord Chancellor (Lord Haldane), Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Sumner, and the Lord Chief Justice (Lord Reading).

As a result of this preliminary sitting the several parties were instructed to prepare and exchange their cases pending the public hearing of the case upon a date to be arranged later.

The preparation of the case occupied nearly four years, and on behalf of the natives it meant a journey to Matabeleland, Mashonaland, and the South African territories.

The Native Case.

The case for the natives rested upon the following main propositions :—

1. The natives had never alienated their land rights.

   (*a*) The only Concessions given by Lobengula were restricted to minerals and waste lands.

   (*b*) No Concession could apply with equal force to both Mashonaland and Matabeleland.

2. The complete expropriation of the whole of the natives from their land rights would be an act without precedent in British Colonial history.

3. The British Government has never by any formal act dispossessed the natives of their land rights.

(*a*) Rhodesia is not British territory and the natives are not British subjects. The British Government is bound to the Matabele and Mashona tribes by a treaty of Amity, and nothing in this treaty gives the Protecting Power the right to divest the *protected* natives of their land rights.

LEGAL COSTS.

The cost of presenting the native case has been considerable, and in order to meet this the Anti-Slavery and Aborigines Protection Society has incurred liabilities from £6,000 to £7,000. The costs of the Chartered Company are, of course, paid from the Company's funds, those of the Crown from the Treasury, the costs of the white settlers of Rhodesia are being found by the Legislative Council under the following resolution:—

(1) That, with reference to the submission of the question of the ownership of the unalienated land to the Privy Council, the Administration be requested to provide the sum of £5,000 to defray the cost of *presenting the case of the inhabitants and people of Rhodesia* to the Privy Council.

(2) That the sum so provided be placed at the disposal of a Committee of three or more of their own number, selected by the elected members of the Legislative Council, with authority to the members so elected to expend the amount, or so much thereof as they may deem necessary, *in collecting evidence and ensuring the presentation of the claim of the inhabitants and people to the best advantage, including the engagement of such professional assistance as they consider advisable.*

No provision has been made for the natives from the above fund, nor at any time has any offer been made either by the Crown, the settlers or the Company to assist in defraying the costs.

The revenue from which the case of the white settlers is defrayed averages about £750,000 per annum. Towards this revenue the natives provide *all the direct taxation* and an appreciable share of the indirect taxation, making together nearly £300,000.

If the Crown or the natives *only succeeded in establishing a right to lands the natives in fact occupy* there is reason to believe that there will be

a sum of not less than £100,000 to be refunded for "rent," etc., irregularly levied since 1914.

The Committee of the Anti-Slavery and Aborigines Protection Society held the view that once their Lordship's Board agreed to accept a statement of the native case the costs would be regarded as a legitimate charge upon public funds for the following amongst other reasons :—

1. That upon the principle of "Commonsense and Justice" it would only be right that the native taxpayers should in the matter of costs be placed on the same footing as the white taxpayers.

2. That a decision by the Secretary of State to exclude the natives from the resolution of the Rhodesian Legislative Council would be to declare in effect that the 750,000 natives are not a part of the "inhabitants and people" of Rhodesia—which would be unjust and absurd.

3. If it were held that for any reason the coloured and indigenous people did not possess an equal claim to that of the immigrant white settlers to charge their costs to the revenue, of which each provides about equal shares, then it is urged that costs should be regarded as a legitimate charge upon the "rents" irregularly levied since 1914 and now believed to be in a "suspense account."

These arguments should receive additional emphasis from the fact that the Secretary of State (Lord Harcourt) forbade any appeal to the chiefs to pay all or any of the costs of their case. The reasons given for this decision appeared to the advisers of the Society as being quite sound, hence no appeal was made against such decision.

The broad facts now established are—(*a*) that the natives had a case, (*b*) that they had been forbidden opportunity to pay costs, (*c*) the costs of the 26,000 white settlers only are to-day a charge upon the revenues of Rhodesia to which the natives contribute nearly a half.

The case came up for hearing in April 16, and was heard continuously until May 2. The Judicial Committee were: Lords Loreburn, Dunedin, Atkinson, Sumner, Scott Dickson. The case of the natives was placed in the hands of Mr. Leslie Scott, K.C., M.P., and Mr. Stuart Bevan. The natives owe a deep debt of gratitude to the Society's solicitors, Messrs. Morgan and Price; both of these gentlemen have given earnest thought and much of their valuable time to the case during its four years of preparation. The Committee of the Society has watched with admiration and warm appreciation the devotion of Mr. Carey Morgan, who, though laid aside through ill-

health, has from his invalid room directed with unrivalled skill the work of preparation and watched patiently every phase of the struggle; always ready with counsel and practical help whenever a critical juncture had been reached.

THE JUDGMENT.

The Judgment was delivered on July 29 and proved to be one of considerable length and not a little obscurity. Lord Sumner read it from typed MS. a task occupying nearly two hours, and the outstanding fact is that the Chartered Company lost its case.

The Chartered Company's Lost Case.

The Lippert Concession upon which the Lord Advocate rested his case on behalf of the Company was declared valueless, conquest inadmissible and possession only evidence of agency. The language of the Judgment is at once caustic and enlightening upon the extraordinary claims which for twenty years the Company has rested on the famous document known as the Lippert Concession.

The Company, say their Lordships, contends that

"He (Lobengula) granted to him (Lippert) all the right of dealing with land of which he had any knowledge, and his ignorance of the nature of an estate in fee ought not to derogate from the amplitude of a grant, which was as wide as he knew how to make it. He reserved at any rate nothing but money considerations for himself, and when the Lippert and the Rudd concessions fell into the same hands, the King had, in substance, sold his country out and out to the Company. Their Lordships cannot accept this argument. As well might it be said that a savage who sold ten bullocks, being the highest number up to which he knew how to count, had thereby sold his whole herd, numbering, in fact, many hundreds."

And again:

"It would follow that Herr Lippert was, or could become at pleasure, owner of the entire kingdom—for nothing is reserved in favour of the inhabitants—from the kraals of the King's wives to his father's grave or the scene of assembly of his indunas and his pitso. Thenceforward the entire tribe were sojourners on sufferance where they had ranged in arms, dependent on the good nature of this stranger from Johannesburg even for gardens, in which to grow their mealies, and pastures, on which to graze their cattle. The Lippert concession may have some value as helping to explain how and why the Crown came to confer the administration of Southern Rhodesia upon the Company, but *as a title deed to the unalienated lands it is valueless.*"

Concession valueless—Conquest inadmissible.

During the whole eleven days' hearing of the case probably the most fascinating morning was the one during which the Lord Advocate endeavoured to establish contributory title on the ground of "Conquest." He knew perfectly well the extreme danger of advancing this argument, but with extraordinary skill he threw out the atmosphere and the glamour of "conquest" without even once using the actual word. Again and again, first one then another of their Lordships attempted to draw out that fatal word, but with really superb ability Mr. Clyde avoided the pitfall. The Judgment however once more reaffirmed that bulwark of the British Constitution :—

"If there was a conquest by the Company's arms, then by well settled constitutional practice, that conquest was on behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it . . ."

Thus ended the long struggle against the preposterous claim of the Chartered Company, namely, that every foot of land in Southern Rhodesia not in the possession of white men belonged not to the Crown or the inhabitants but to the Shareholders of the Chartered Company. That other recommendations upon financial matters are incorporated in the Judgment is a matter of little, if any, interest to the Society.

What the Crown has Won.

Of the three opponents of the Company, the Crown wins most in that legal title is vested in the British Crown as Trustee for the inhabitants. The real position appears to be best summed up in the following passage :—

"Their Lordships think it sufficient to say that, except in so far, if at all, as the rights of the Crown are subject to those of the Natives and the Company, nothing has been shown to have happened or to have been done, that would prevent the Crown, if and when the Company's tenure of the administration of Southern Rhodesia determines, from disposing of the lands then remaining unalienated by any lawful means and in favour of any persons or purposes, as it may duly be advised . . ."

What the Natives have Won.

The Natives come an easy second to the Crown in what they have secured, the white settlers receive but scant attention in the Judgment. In the first place the natives have gained the enormous advantage of finding the lands they occupy no longer under the control of the Chartered Company's

Shareholders but under the direct control of the Crown, and, as will be observed from the above passage, Crown rights are subject to indigenous rights.

Next to this the Natives have removed from them the menace of a perpetual temptation to cut down their reserves. Prior to the Judgment, the Company's claim to the Commercial ownership of the reserves meant that it was always in the interest of the Company to make out a case for cutting off the best portions of the reserves, the Natives were thus constantly exposed to the threat of eviction, indeed whilst the case was proceeding it had been decided to evict the Natives from 6,000,000 acres of reserves and place them elsewhere on 5,000,000 acres.

The next step on behalf of the natives is that of securing from the Crown a settled system of land tenure ; adequate, secure, and in accord with the Judgment. The Committee of the Anti-Slavery and Aborigines Society will at once address themselves to this new task and at the same time will take up the question of native costs which, in the opinion of the Committee and its advisers, should be treated as a Public Charge.

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